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United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

THE NEW YORK, NEW HAVEN & HARTFORD RAILROAD COMPANY, a corporation, BOSTON & MAINE RAILROAD, a corporation, CENTRAL NEW ENGLAND RAILWAY COMPANY, a corporation, THE NEW YORK CENTRAL & HUDSON RIVER RAILROAD COMPANY, a corporation, THE MICHIGAN CENTRAL RAILROAD COMPANY, a corporation, ERIE RAILROAD COMPANY, a corporation, CHICAGO & ERIE RAILROAD COMPANY, a corporation, THE CANADIAN PACIFIC RAILWAY COMPANY, a corporation, THE MINNEAPOLIS, ST. PAUL & SAULT STE. MARIE RAILWAY COMPANY, a corporation, SPOKANE INTERNATIONAL RAILWAY COMPANY, a corporation, CHICAGO & NORTHWESTERN RAILWAY COMPANY, a corporation, THE CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY, a corporation, and J. M. DICKINSON, as Receiver thereof, BOSTON & ALBANY RAILROAD COMPANY, a corporation, UNION PACIFIC RAILROAD COMPANY, a corporation, OREGON SHORT LINE RAILROAD COMPANY, a corporation, OREGON-WASHINGTON RAILROAD & NAVIGATION COMPANY, a corporation,

Plaintiffs in Error,

vs.

BALLOU & WRIGHT, a corporation,

Defendant in Error.

BRIEF OF COUNSEL FOR PLAINTIFFS IN ERROR.

Upon Writ of Error to the District Court of the United States for the District of Oregon.

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

THE NEW YORK, NEW HAVEN & HARTFORD RAILROAD COMPANY, a corporation, BOSTON & MAINE RAILROAD, a corporation, CENTRAL NEW ENGLAND RAILWAY COMPANY, a corporation, THE NEW YORK CENTRAL & HUDSON RIVER RAILROAD COMPANY, a corporation, THE MICHIGAN CENTRAL RAILROAD COMPANY, a corporation, ERIE RAILROAD COMPANY, a corporation, CHICAGO & ERIE RAILROAD COMPANY, a corporation, THE CANADIAN PACIFIC RAILWAY COMPANY, a corporation, THE MINNEAPOLIS, ST. PAUL & SAULT STE. MARIE RAILWAY COMPANY, a corporation, SPOKANE INTERNATIONAL RAILWAY COMPANY, a corporation, CHICAGO & NORTHWESTERN RAILWAY COMPANY, a corporation, THE CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY, a corporation, and J. M. DICKINSON, as Receiver thereof, BOSTON & ALBANY RAILROAD COMPANY, a corporation, UNION PACIFIC RAILROAD COMPANY, a corporation, OREGON SHORT LINE RAILROAD COMPANY, a corporation, OREGON-WASHINGTON RAILROAD & NAVIGATION COMPANY, a corporation,

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THE NEW YORK, NEW HAVEN & HARTFORD RAILROAD COMPANY, a corporation, et al,
Plaintiffs in Error

vs.

BALLOU & WRIGHT, a corporation,
Defendant in Error

Names and Addresses of the Attorneys of Record.

Mr. H. A. Scandrett, 58 East Washington Street, Chicago, Illinois.

Mr. Arthur C. Spencer and Mr. Charles E. Cochran, 510 Wells Fargo Building, Portland, Oregon, for the Plaintiffs in Error.

Mr. Will H. Bard, Pittock Building, Portland, Oregon, and Mr. James E. Fenton, Claus Spreckles Building, San Francisco, California, for the Defendant in Error.

STATEMENT OF THE CASE.

For several years prior to the 10th day of March, 1913, the plaintiffs in error, as connecting carriers from Armory, Massachusetts to Portland, Oregon, had published and filed with the Interstate Commerce Commission, a commodity rate on motorcycles in carload lots of $4.00 per hundred pounds, with a minimum carload weight of fifteen thousand pounds. Likewise, during the time prior to March 9, 1912, there was issued, published, filed and effective with the Interstate Commerce Commission, certain class rates contained in Transcontinental Freight Bureau Westbound Tariff 4-I, I. C. C. No. 942, issued by R. H. Countiss, which carried a first-class rate of $3.00 per hundred pounds from Armory, Massachusetts, to Portland. Also between March 9, 1912, and January 3, 1913, the first-class rate between Armory, Massachusetts, and Portland, Oregon, was $3.70 per hundred pounds. The class rates from common points with Armory, Massachusetts, are all referable to a certain tariff document filed with the Interstate Commerce Commission, known as the Western Classification. This document was concurred in by all the Western railroads and approved by the Interstate Commerce Commission, and its object and purpose is to classify various commodities so as to determine the application of the class rates above referred to.

In the Western classification, motorcycles are rated as first class, but whenever a carload commodity rate is established, it removes the applica-

tion of class rates to or from the same points on that commodity in carload quantities.

On the 10th day of March, 1913 (Trans. p. 17), the defendant in error filed its petition with the Interstate Commerce Commission, claiming in substance that the commodity rate of $4.00 per hundred pounds, with minimum carload weight of 15,000 pounds on motorcycles from Armory, Massachusetts, to Portland, Oregon, was unjust and unreasonable and contrary to and in violation of Section 1 of the Act to Regulate Commerce.

The shipments in question moved from Armory, Massachusetts, to Portland, Oregon, under a duly posted, published and filed commodity rate of $4.00 per hundred pounds in carload lots, and this rate was assessed and collected by the carriers.

Issues were formed by the carriers, parties to the proceeding, tendering answers (Trans. 148, 152, 154, 156, 157, 158 and 159). Testimony was taken (Respondent's Exhibit 1, Trans. 161 to 189 inclusive).

On February 3, 1914, from such record the Commission made a

"REPORT IN WRITING IN RESPECT THERETO."

(Section 14, Act to Regulate Commerce, as amended March 2, 1889, and June 29, 1906.) (Trans. 25.)

We quote a portion of the Commission's report (Abstract 27):

> "For the reasons given in cases referred to herein and on this record, we are of opinion and find:
>
> (a) That the rate charged complainant on the shipments made by it was unreason-

able to the extent it exceeded the first-class rate in effect at the time the shipments were made.

We further find:

(b) That the complainant was damaged in an amount equal to the difference between the amount collected and the amount it would have paid at the first-class rate contemporaneously in effect, and

(c) That it is, therefore, entitled to an award of reparation.

(d) On this record, however, the amount of reparation cannot be determined."

(We have divided the findings into paragraphs (a), (b), (c) and (d) for convenience.)

The Commission's holding further directed the defendant in error to prepare a statement showing as to each shipment upon which reparation is claimed, the date of removal, point of origin, point of destination, route, weight, car number and initial, rate applied, charges collected and the amount of reparation due, based upon the first-class rate contemporaneously in effect. This statement, with the freight bills covering the shipments, was required to be submitted to the plaintiffs in error for verification, and the same was verified, returned and filed with the Commission.

Of course, in checking the correctness of complainant's statement, the carriers were not conceding such information to be material to an issue of the proper measure or quantum of damage defendant in error claimed to have suffered on account of having to pay the commodity rate instead of the first-class rate in effect at the time the shipments moved. No testimony was intro-

duced before, received in evidence or in any way, manner or form considered by the Interstate Commerce Commission, bearing upon the subject or issue of damages or not in passing upon the charge of the defendant in error that the commodity rate was unjust and unreasonable.

The defendant in error in its petition before the Interstate Commerce Commission (Trans. 17, 23), did not plead or apply for damages in any sum, although it did pray for an order that the carriers be required to (Trans. 23) "pay to complainant by way of reparation for the unlawful charges hereinbefore described, the sum of $1732.54, or such other sum as in view of the evidence to be adduced herein, the Commission may consider the complainant entitled to."

On the 14th day of August, 1914, the Commission made a supplemental order called,

AN ORDER AUTHORIZING REPARATION (Trans. 29.)

This order recites:

> "This case being at issue upon complaint and answer on file and having been duly heard and submitted by the parties and full investigation of the matters and things involved having been had, and the Commission having on February 3, 1914, made and filed a report containing its findings of fact and conclusions of law, which said report is hereby referred to and made a part hereof, and this case now coming on to be considered in regard to an application for reparation thereon, and it appearing that the parties have filed an agreed statement respecting the movement of the shipments involved * * * we find that complainant is entitled to an

award of reparation in the sum of $828.13, with interest from January 1, 1913."

The carriers having refused to comply with the order of reparation the defendant in error began an action under Section XVI of the Act to Regulate Commerce against The New York, New Haven & Hartford Railroad Company and other railroads above mentioned, to recover damages alleged to have been sustained by a shipper and awarded by the Interstate Commerce Commission by reason of a certain decision by such Commission, holding that the above named carriers violated the prohibition in Section 1 of that Act against unreasonable rates.

The petition contains three causes of action and relates to three separate and distinct transcontinental movements, which we, for convenience of statement, divide into three groups:

GROUP 1—CARRIERS INCLUDED.

The New York, New Haven & Hartford Railroad Company,

Boston & Albany Railroad Company,

The New York Central & Hudson River Railroad Company,

The Michigan Central Railroad Company,

Chicago & Northwestern Railway Company,

Union Pacific Railroad Company,

Oregon Short Line Railroad Company,

Oregon-Washington Railroad & Navigation Company.

RATE COLLECTED—Commodity rate of $4.00 per hundred pounds.

RATE FOUND REASONABLE BY COMMISSION: First-class rate contemporaneously in effect.

(Note: Shipments aggregating 32,000 pounds under this order would take a rate of $3.00 per hundred pounds, and shipments aggregating 46,700 pounds would take a rate of $3.70 per hundred pounds.)

Excess of rate charged by carriers over rate found reasonable by Commission as applied to the shipments aggregate $463.10.

GROUP 2—CARRIERS INCLUDED.

The New York, New Haven & Hartford Railroad Company,

Central New England Railway Company,

Erie Railroad Company,

Chicago & Erie Railroad Company,

The Chicago, Rock Island & Pacific Railway Company,

Union Pacific Railroad Company,

Oregon Short Line Railroad Company,

Oregon-Washington Railroad & Navigation Company.

RATE COLLECTED—Commodity Rate of $4.00 per hundred pounds.

RATE FOUND REASONABLE BY COMMISSION: First-class rate contemporaneously in effect, to-wit: $3.00 per hundred pounds.

Excess of rate charged by carriers over rate found reasonable by Commission as applied to the shipments, namely, 20,615 pounds, aggregates $206.15.

GROUP 3—CARRIERS INCLUDED.

The New York, New Haven & Hartford Railroad Company,

Boston & Maine Railroad,

Canadian Pacific Railway Company,

The Minneapolis, St. Paul & Sault Ste. Marie Railway Company,

Spokane International Railway Company,

Oregon-Washington Railroad & Navigation Company.

RATE COLLECTED—Commodity rate of $4.00 per hundred pounds.

RATE FOUND REASONABLE BY COMMISSION: First-class rate contemporaneously in effect, to-wit: $3.00 per hundred pounds.

Excess of rate collected over rate found reasonable by Commission as applied to the shipment—15,888 pounds, aggregates $158.88.

Section 14 of the Act to Regulate Commerce, first paragraph, provides:

> "* * * And in case damages are awarded, such report shall include the findings of fact on which the award is made."

The Commission found that complainant,

> "(b) Was damaged in an amount equal to the difference between the amount collected and the amount it would have paid at the first-class rate contemporaneously in effect."

Now the Commission followed the pathway of one of two dilemmas; it either

(a) Measured the damages by computing the difference between the two rates, or

(b) Found a fact on an issue of damage or not without evidence to support it.

It is common knowledge that the Interstate Commerce Commission holds the view that it can award damages by way of reparation according to the measure indicated by the difference between the two rates, namely, the one overthrown and that fixed as a substitute therefor, without requiring the complainant to prove that he sustained any damage; it could happen that a claimant submitted proof showing a damage, the amount of which would equal "the difference between the amount collected and the amount it would have paid at the first-class rate contemporaneously in effect." But in this case no such evidence nor any evidence was offered.

Defendant in error neither before the Interstate Commerce Commission nor before the District Court introduced testimony respecting the pecuniary loss sustained as a result of the carriers' alleged violation of the Act to Regulate Commerce, the recovery of which is permitted by Section 8 of that Act. Instead, however, they have alleged in paragraph 14 (Trans. 16), of the first cause of action, paragraph 7 of the second cause of action, and paragraph 10 of the third cause of action, that it has been damaged in a particular sum alleged,

> "Being the difference between the amount actually charged and collected by the said respondents and paid by the said petitioner and the reasonable amount which the said petitioner would have paid based upon the said first-class rate at the time of said ship-

ment which should have been applied to motorcycles in car lots."

The carriers declined to pay on the ground:

NO DAMAGE SHOWN.

The carriers contended before the Interstate Commerce Commission (Trans. 168, cross-examination of Witness C. F. Wright, plaintiff in error, Exhibit 1, testimony before I. C. C.), when these rates were investigated, as they have contended before the lower court and still contend here, that the defendant in error was not damaged, has not been shown to be damaged, and that no testimony anywhere supports such issue or such finding.

Thereafter, the carriers having refused to comply with the order for the payment of money within the time limit, the defendant in error filed in the District Court of the United States for the District of Oregon, a petition "setting forth briefly the cause for which he claims damages and the order of the Commission in the premises." The carriers who were parties to the proceedings before the Interstate Commerce Commission were made parties to this proceeding; the interests of each being in common, only as indicated in Groups 1, 2 and 3 heretofore set out. A trial was had, the orders of the Interstate Commerce Commission of date February 3, 1914, and August 14, 1914, being admitted by the pleadings and the extent of the shipments made having been also admitted, the defendant in error rested its case.

Reliance was had upon that part of Section 16 as amended, of the Act to Regulate Commerce, which reads:

> "On the trial of such suit the findings and order of the Commission shall be prima facie evidence of the facts therein stated."

THE COURT OF APPEALS WILL PLEASE NOTE THAT THE ORDERS OF THE INTERSTATE COMMERCE COMMISSION DO NOT CONTAIN ANY FINDINGS OF FACT IN RELATION TO THE MEASURE, QUANTUM OR FACT OF DAMAGE AS DISTINGUISHED FROM THE INQUIRY INTO THE REASONABLENESS OF THE RATE.

The Carriers' Answer. The answer of the carriers, owing to the necessity of getting authority from so many legal departments of the defendant carriers, was somewhat illogically entered. Those for whom the respondents' attorneys of record had immediate authority, filed their answer on December 20, 1915 (Trans. 49). Later authority was secured from the balance of the plaintiffs in error and an appearance was entered for them on the 11th day of February, 1916 (Trans. 66), and these carriers adopted and made as their own the amended answer of the carriers who filed their appearance and answer on the 20th of December previously.

The petitioner in the court below desired to amend the petition to include Honorable J. M. Dickinson, receiver of The Chicago, Rock Island & Pacific Railway Company, and whereupon the plaintiffs in error desiring to file an amendment to the amended answer (Trans. 69), it was stipulated between the counsel (Trans. 103) that such amendment be filed with the Clerk and consid-

ered a part of the amended answer, without the formality of rewriting the same. By way of reference, these answers will be found in the transcript as follows:

Answer of Boston & Maine Railroad:

The Canadian Pacific Railway Company,

The Minneapolis, St. Paul & Sault Ste. Marie Railway Company,

Spokane International Railway Company,

Oregon Short Line Railroad Company,

Union Pacific Railroad Company,

Oregon-Washington Railroad & Navigation Company (Trans. 49),

The New York, New Haven & Hartford Railroad Company,

The New York Central & Hudson River Railroad Company,

The Michigan Central Railroad Company,

Erie Railroad Company,

Chicago & Erie Railroad Company,

Central New England Railway Company,

Chicago & Northwestern Railway Company,

The Chicago, Rock Island & Pacific Railway Company, and

J. M. Dickinson, Receiver, and

Boston & Albany Railroad Company (Trans. 66).

Afterwards, on February 16, 1916, the re-

spondents filed a further and separate answer and defense to the three causes of action stated in petitioner's petition (Trans. 70).

DEMURRER TO ANSWER.

On February 17, 1916, a demurrer to the answer of the respondents and to the amendment to the amended answer heretofore mentioned, alleging as ground therefor that the same fails to state sufficient facts to constitute a defense or counterclaim or confession and avoidance of the causes of action, or either of them set forth in the petition herein (Trans. 72).

The argument of counsel and the ruling of the court upon this demurrer was suspended until after the testimony was taken. In the meantime defendant in error filed a reply (Trans. 75). After the testimony was taken, the court made and entered an order sustaining the demurrer to the answer of the carriers (Trans. 74), and directed the petitioner's counsel to prepare findings of fact and conclusions of law in plaintiff's favor (Trans. 80), after which there was entered on the 21st day of February, 1916, a judgment against the several groups of carriers for certain amounts therein set forth (Trans. 94).

At the time of the trial and at the close of the testimony, the carriers presented certain findings of fact and conclusions of law and requested the court to adopt, sign and file the same (Trans. 97). The Court refused to do so, after which a bill of exceptions containing all of the testimony taken before the Court and all of the pleadings before the Interstate Commerce Commission and

all facts investigated by the Interstate Commerce Commission based upon which, such Commission made the report in writing of February 3, 1914 (Trans. 24), and later the order of reparation made August 14, 1914 (Trans. 29).

The proof, as disclosed by the bill of exceptions, fully supported the carriers' answers. There was no conflict in the testimony.

DEFENDANT IN ERROR CONTENDS.

The petitioner, defendant in error, based its right of recovery upon the following propositions:

(a) It shipped certain carloads of motorcycles from Armory, Massachusetts, to Portland, Oregon, at certain times and paid a commodity rate of $4.00 per hundred pounds.

(b) It petitioned the Interstate Commerce Commission to revise such rate, alleging the same to be unjust and unreasonable, in violation of Section 1 of the Act to Regulate Commerce, incidentally asking a reparation in a certain sum, neither having plead nor proved actual damage.

(c) The Interstate Commerce Commission made a report in writing, holding such rate unreasonable to the extent that it exceeded the first-class rate contemporaneously in effect, and found the complainant was dameged in an amount equal to the difference between the amount collected and the amount it would have paid at the first-class rate contemporaneously in effect, which means, as alleged in the plaintiff's petition, paragraphs 14, 7 (Trans. 37) and 10 (Trans. 45) of the respective causes of action,

that the Interstate Commerce Commission measured the damage by using the difference between the amount actually charged and collected and the amount it would have paid at the rate fixed by the Commission as reasonable, amounting in money to the sum of $828.13, with interest from January 1, 1913.

(d) That petitioner's case is made by showing the shipments moved and introducing the orders of the Interstate Commerce Commission just referred to, without additional testimony showing the amount of injury suffered or the resulting pecuniary loss inflicted.

THE CARRIERS CONTEND

1. Ballou & Wright, defendant in error, in respect to motorcycles is distributing agent of the manufacturer (Trans. 104).

2. They have a contract with Hendee Manufacturing Company of Armory, Massachusetts, whereby they become the exclusive distributing agents for the area, district or trade territory consisting of all of the State of Oregon and a part of the States of Washington and Idaho. All the motorcycles mentioned in the bill of complaint came from Armory, Massachusetts, and were purchased f. o. b. factory at Armory; the factory fixing a price at which they were to sell the machines, a catalogue price. Large quantities of catalogues were furnished and distributed to the public and the prices printed in those catalogues were the prices at which Ballou & Wright were allowed to and did sell all of the machines purchased and shipped (Trans. 106).

The gross price at factory to Ballou & Wright was always the list price published in the cata-

logue, available for public distribution (Trans. 107), and Ballou & Wright sold all of these motorcycles in turn with reference to this catalogue list price (Trans. 107), adding to the catalogue list price a sufficient sum to cover the freight, telling the customer in the course of the negotiation that this shipment was for the purpose of covering the freight, thereby intending and giving to the customer the factory price, f. o. b. Armory, Massachusetts, plus the freight.

4. Carriers admit the quantity of the shipments claimed and in turn have shown and contend that all of the motorcycles were sold and that none remained on hand, nor were any sold for less than the catalogue price, plus the freight.

5. Carriers further contend that by reason of the assessment and collection of the commodity rate of $4.00, the defendant in error was deprived of no trade area nor was their district in which they were permitted to deal by their contract, limited or circumscribed. Their business was as large and their profits as substantial under one rate as another. They sold to their trade all the motorcycles bought and shipped and obviously could have done no more. Their competitors did likewise and no elements of discrimination or preference are present.

6. That no pecuniary loss has been proven to have been suffered by the defendant in error, and to support a recovery under Section 8 of the Act to Regulate Commerce, the only source and authority of the right to recovery, there must be a showing of some specific pecuniary injury, and that the mere fact of a violation of Section 1 of the Act to Regulate Commerce does not of itself create a cause of action.

7. That while the statute, Section 16, affords to the orders of the Interstate Commerce Commission prima facie effect, yet such order was made without any testimony to support it, and in the absence of such testimony, the Court will review the question of its validity, holding the same invalid, and, therefore, decline to afford it the evidentiary character given by the statute with the result that the judgment of the lower court becomes erroneous. Moreover, the prima facie effect of the Commission's order was fully overcome by the carriers' testimony including that offered as well as that admitted in evidence.

8. The lower court found difficulty in distinguishing between a straight overcharge and the situation arising where the carrier has assessed and collected a rate lawful and proper at the time the shipment moved, but which was subsequently determined to be unreasonable and excessive.

An overcharge arises where a carrier charges more than a published rate. The excess of such published rate is unlawfully exacted. The sum being exacted without a rate to base it upon, may be recovered back in an action for money had and received. Where, however, the carrier has assessed and collected a sum equal to the published rate on a given article, it has merely performed an obligatory act, for it is the duty of the shipper to pay and the carrier to retain such amount, and no court or commission may direct the return of the same, or any part thereof.

Should the Commission subsequently find such rate to be unreasonable and excessive, it may reduce the same to a sum reasonable and proper. The excess of the published rate over

the rate subsequently fixed as reasonable is not an overcharge.

The situation arising from the entire transaction of which such excess is but a part, merely amounts to a violation of Section 1 of the Act to Regulate Commerce, for the results of which damages followed recoverable when proven under Section 8 of said Act.

The lower court having found generally in plaintiff's favor, entered a judgment as prayed for. A writ of error was issued out of this court requiring the record to be filed for the purpose of review, and the case is now before the Circuit Court of Appeals for re-examination.

POINTS AND AUTHORITIES.

I.

The recovery in this action is allowed only by the provisions of Section VIII of the Act to Regulate Commerce. This section measures the recovery by creating a liability "for the full amount of damages sustained in consequence of such violation of the provisions of this act," and the right to recover is limited to the pecuniary loss suffered and proven.

Parsons v. Chicago & N. W. R. R. Co., 167 U. S. 447, 460.

Pennsylvania R. R. Co. v. International Coal Mining Co., 230 U. S. 184, 206.

Meeker & Co. v. Lehigh Valley R. R. Co., 236 U. S. 412, 429.

II.

The following sections of the Act to Regulate Commerce are material to the consideration of this case:

Section 1 of the Act requires all charges in respect to transportation to be just and reasonable, prohibiting and declaring unlawful every unjust and unreasonable charge.

Section VIII creates a liability "to the person or persons injured thereby for the full amount of damages sustained in consequence of any such violation of the provision of this act," etc.

Section XIII authorizes complaints to the Interstate Commerce Commission and inquiries and investigations to be made.

Section XIV requires the Commission after investigation "to make a report in writing in respect thereto * * * and in case damages are awarded such report shall include the findings of fact on which the award is made."

Section XVI authorizes the Commission, if it shall find any party "is entitled to an award of damages under the provisions of this Act for a violation thereof," to make an order directing the carrier to pay such sum.

The section further authorizes a proceeding to recover such damages in the District Court of the United States, such proceeding to take the course as other civil suits for damages, "except that on the trial of such suit, the findings and order of the Commission shall be prima facie evidence of the facts therein stated."

Fuller. The Act to Regulate Commerce construed by the Supreme Court, 58, 304, 362, 366, 410.

III.

An order of the Interstate Commerce Commission authorizing reparation is not within the statute unless the term "entitled to an award of reparation" as used in the order, is construed to mean "an award of damage." This probably is the meaning.

Mills v. Lehigh Valley R. R. Co., 238 U. S. 473, 481.

IV.

A finding by the Interstate Commerce Commission contrary to the undisputed character of the evidence is void.

I. C. C. v. Louisville & Nashville R. R. Co., 227 U. S. 88.

I. C. C. v. B. & O. S. W. R. R., 226 U. S.14.

Atlantic Coast Line v. No. Carolina Corp. Com., 206 U. S. 20.

Southern Pacific v. I. C. C., 219 U. S. 433.

A finding without evidence is beyond the power of the Commission. An order based thereon is contrary to law and must be set aside.
I. C. C. v. L. & N. R. R. Co., 227 U. S. 88, 92.

V.

While the Court will not review the Commission's finding of fact by passing upon the credibility of witnesses or conflicts in the testimony, nevertheless the legal effect of evidence is a

question of law and a finding without evidence is beyond the power of the Commission.

I. C. C. v. L. & N. R. R. Co., 227 U. S. 88, 92.

Florida East Coast Ry. Co. v. U. S., 234 U. S. 167, 185.

VI.

The question of the amount of the damages to be awarded by the Commission was to be determined from the evidence, and in the absence of a showing to the contrary, it will be presumed the findings were justified by the evidence. But it having been shown that there was no evidence to support the findings, the question is then justiciable and becomes one of law which the Court will review.

Meeker & Co. v. Lehigh Valley R. R. Co., 236 U. S. 412, 430.

VII.

A carrier can only charge the published rate for the same article, and when collected cannot pay back any part thereof under any pretense however equitable to any shipper or every shipper.

Pennsylvania R. R. Co. v. Int. Coal M. Co., 230 U. S. 184, 196.

If as a fact the rates were unreasonable, the shipper was nevertheless bound to pay, and the carrier to retain what had been paid, leaving, however, to the former the right to apply to the Commission for reparation, that is, for damages

under Section VIII of the Act to Regulate Commerce.

Pennsylvania R. R. Co. v. Int. Coal M. Co., 230 U. S. 184, 197.

Reparation means to pay damages.

Mills v. Lehigh Valley R. R. Co., 238 U. S. 473, 481.

Reparation means, indemnification for loss or damage; satisfaction for any injury; amends.

Southern Pacific Co. v. Gold Valley Cons. Milling Co., 220 Fed. 14, 20.

See,

Cent. Dict. & Encyc., Tit.: Reparation.

It does not mean that the carrier should return to the shipper the excess of the published rate over the rate fixed by the Commission, even with the Commission's authority, for the Commission is limited to an award of damages which may or may not equal such excess.

VIII.

The Commission has uniformly applied the rule to discrimination cases and unreasonably excessive rate cases, that the damage recoverable under Section VIII was the difference between the published rate paid by the complaining shipper and the lower rate fixed by the Commission, or that given by the carrier to a more favored shipper.

Barnes Interstate Transportation, Sec. 428, Par. C.

Burgess Cases, 13 I. C. C. Rep. 668, 680.

Wallingford v. A. T. & S. F., 30 I. C. C. Rep. 19, 21.

Hoover, etc. v. C. H. & D. Ry. Co., 31 I. C. C. Rep. 550, 552.

Cudahay Packing Co. v. A. T. & S. F. Ry. Co., 32 I. C. C. 560, 563.

Omaha Grain Exchange v. Chicago & Alton Ry. Co., 32 I. C. C. Rep. 597, 600.

DuPont, DeNemours Powder Co. v. L. & N. Ry. Co., 33 I. C. C. Rep. 288, 290.

It is now held in discrimination cases that the damages are not necessarily measured by the difference between the published rate paid by the complaining shipper and the lower rate given to a more favored shipper, but may be more or less than such difference, but that whatever they are, they must be proven.

Pennsylvania R. R. Co. v. Int. Coal Co., 230 U. S. 184, 203.

IX.

Since the decision in the Pennsylvania Railroad v. International Coal Mining Co., 230 U. S. 184, 203, the Interstate Commerce Commission has found no difficulty in applying the rule that no recovery can be had in discrimination cases without proof of actual pecuniary loss.

New Orleans Board of Trade v. Ill. Cent. Ry. Co., 29 I. C. C. Rep. 32.

Speigle v. Southern R. R. Co., 32 I. C. C. Rep. 687.

But the Commission in unreasonable and excessive rate cases has adhered to the doctrine that a shipper may recover the difference between the rate paid and what would have been a reasonable rate at the time the shipment moved,—the Commission fixing the amount of such potentially reasonable rate.

Ballou & Wright v. N. Y., N. H. & H. R. R. Co., et al, 34 I. C. C. Rep. 120.

X.

In an endeavor to follow the previous ruling of the Interstate Commerce Commission, a certain course of reasoning has been undertaken, having for its purpose to distinguish between discrimination cases and cases charging an excessive and unreasonable rate, but it is submitted that such reasoning is illogical and erroneous.

Darnell-Taenzer Lbr. Co. v. Southern Pacific, 221 Fed. Rep. 890, 894.

ARGUMENT.

The sole question for decision in this case is: What is the measure of the damage recoverable under Section VIII of the Act to Regulate Commerce, in cases arising out of the violation of Section 1 of the Act, which requires all charges in respect to transportation to be just and reasonable and which prohibits unjust and unreasonable charges?

The plaintiffs in error contend that the recovery in this proceeding is allowed only by the provisions of Section VIII of the Act to Regulate

Commerce. This Act declares the common carrier "shall be liable to the person or persons injured thereby for the full amount of damages sustained in consequence of any such violation of the provisions of this Act," etc.

There is no special provision fixing a different measure of recovery for each of the three general commands of the Act to Regulate Commerce, that is to say, there does not exist a certain measure of damage for the violation of Section 1 of the Act, another and different measure for the violation of Section 11 and a third and still different measure for the violation of Section 111. For each violation, Section VIII permits the recovery "for the full amount of damages sustained."

In the case of

Parsons v. Chicago & N. W. R. R. Co., 167 U. S. 447,

at page 460, the Supreme Court of the United States said:

> "The only right of recovery given by the Interstate Commerce Act to the individual is to the 'person or persons injured thereby for the full amount of damages sustained in consequence of any of the violations of the provisions of this act.' So before any party can recover under the Act, he must show not merely the wrong of the carrier, but that that wrong has in fact operated to his injury."

The Supreme Court in this case was discussing the recovery permitted by and the limitations contained in Section VIII of the Act, and in fur-

ther consideration of the causes of action created by this section, the Court in the case of

> *Pennsylvania R. R. Co. v. International Coal Mining Co.,* 230 U. S. 184, at p. 206,

further remarked:

> "This conclusion, that the right to recover is limited to the pecuniary loss suffered and proved, is demanded by the language of the statute, the construction put upon it years ago in the Parsons case, and is the view taken in the only other cases we find in which this question, under the Act to Regulate Commerce, has been construed."

The case referred to was that of

> *Knudesen v. Mich. Cent. R. R.,* 148 Fed. 968, 974,

wherein the Circuit Court of Appeals for the Eighth Circuit remarked that,

> "To support a recovery under this section, there must be a showing of some specific pecuniary injury. A cause of action does not necessarily arise from those acts or omissions of a common carrier that may subject it to a criminal prosecution by the government, or to corrective or coercive proceedings at the instance of the Commission."

The rule announced in the Parsons case was further adhered to in the case of

> *Meeker & Co. v. Lehigh Valley R. R. Co.,* 236 U. S. 412, 429.

The Parsons case involved a violation of Section 2 of the Act. It was a discrimination case.

The petitioner seeks to distinguish between the rule in discrimination cases from that in unreasonably excessive rate cases. It is notably true that the reasoning which has lead the Interstate Commerce Commission to measure the damage in both sorts of cases by taking the difference between the two rates prior to the decision of the Supreme Court in the Parsons case, has been abandoned only in discrimination cases, and is still adhered to in cases such as the one at bar, notwithstanding that Section VIII of the Act to Regulate Commerce makes no distinction between the same.

The case of Burgiss v. Transcontinental Freight Bureau, 13 I. C. C. Rep. 668, 680, is the leading case of the Interstate Commerce Commission upon the subject. We quote:

> "It is impossible to say, therefore, to what extent these complainants may have been actually damaged by the advance in this rate, if the word 'damage' is to be interpreted and applied as claimed by the defendants.
>
> Such is not, in our opinion, the proper meaning of this term. These complainants were shippers of hardwood lumber to this destination and they were entitled to a reasonable rate from the defendants for the service of transportation. An unreasonable rate was in fact exacted. They were thereby deprived of a legal right and the measure of their damage is the difference between the rate to which they were entitled and the rate which they were compelled to pay."

The foregoing principle was adopted by the lower court. The plaintiffs in error dispute such to be the proper measure.

The reasoning which induced the Commission to adopt the foregoing measure does not appear to be sound. It certainly does not follow that because it was impossible to say what the actual damages were, or in other words, because it was impossible to find from the proof the "full amount of damages sustained" that the Commission would be thereby justified in arbitrarily fixing some other measure of damage, unsupported by testimony and unfounded in law. The Commission said at page 680:

> "If complainants were obliged to follow every transaction to its ultimate result and to trace out the exact commercial effect of the freight rate paid, it would never be possible to show damages with sufficient accuracy to justify giving them. Certainly these defendants are not entitled to this money which they have taken from the complainants, and they ought not to be heard to say that they should not be required to refund this amount because the complainants themselves may have obtained some portion of this sum from the consumer of the commodity transported."

It is very respectfully submitted that no instance can be found within the books from the earliest commentator to the latest opinion of the Federal Supreme Court, justifying an arbitrary finding of damage, because the plaintiff or claimant finds himself in a position where it is impossible for him to show himself to have been actually damaged. This reasoning had its effect upon the Circuit Court of Appeals for the Sixth Circuit in the case of

> *Darnell-Taenzer Lbr. Co. v. Southern Pacific,* 221 Fed. 890, 894.

The learned judge speaking for the Court in this case, recognizing that the plaintiff had not proven actual pecuniary damage, justified it being awarded, in the following words, at page 894:

> "In our judgment, a rule requiring the shipper to mathematically demonstrate that it was actually pecuniarly damaged in the amount of the unreasonable excess in rates so paid would effectually emasculate the reparation provision of the Interstate Commerce Act."

The Court in following the lead of the Commission rather than that of the Supreme Court of the United States, gave as an additional reason the fact that although the Supreme Court in the Meeker case reaffirmed the rule that damages in reparation cases must be proved, yet it is said the Court did not pass directly upon the proposition involved in the Burgess case and in the instant case, and because the court found nothing in the International Coal Company case nor the Meeker case conflicting with the view that damages resulted from the imposition of unreasonably excessive rates are normally measured by the difference between the rate charged and a reasonable rate, the court believed the Burgess holding correct.

The Court further said at page 894:

> "Cases of excessive and unreasonable rate differ from discriminating charges in the fact that in the latter there is nothing unlawful in the charging and receiving of the higher or published rate on which the demand for reparation is based; the unlawfulness is in giving a lower rate to someone else. On the other hand, the charging of an

excessive and unreasonable rate is *ipso facto* unlawful."

It cannot be true that the charging of an excessive and unlawful rate is *ipso facto* unlawful, provided such rate was duly filed with the Interstate Commerce Commission as required by law. If, as a fact the rates were unreasonable the shipper was nevertheless bound to pay and the carrier to retain what had been paid, leaving, however, to the former the right to apply to the Commission for reparation, that is, for damages under Section VIII of the Act to Regulate Commerce.

Pennsylvania R. R. Co. v. International Coal Mining Co., 230 U. S. 184, 197.

Neither is it true that to require damages to be proven would effectually emasculate the reparation provisions of the Interstate Commerce Act, for common justice required proof of the "full amount of damages sustained in consequence of any such violation of the provisions of this Act," before a judgment of recovery can be allowed. Moreover, the Supreme Court of the United States in expressing its surprise at the claim that impossibility of proof was a reason for recovery, used the following language, 230 U. S. 200:

"It is said, however, that it is impossible to prove the damage occasioned to one shipper by the payment of rebates to another, and that if the plaintiff is not entitled to recover as damages the same drawback that was paid to its competitor, the statute not only gives no remedy, but deprives the plaintiff of a right it had at common law to re-

> cover this difference between the lawful and unlawful rate. We are cited to no authority which shows that there was any such ancient measure of damages and no case has been found in which damages were awarded for such discrimination."

Surely, therefore, if the shipper was unable on account of sheer impossibility to prove damages in discrimination cases, why should a judgment be awarded with any greater facility when the shipper finds himself unable, by reason of impossibility, to prove damages in excessive rate cases. There was no such ancient measure of damages. Section VIII of the Act to Regulate Commerce permits recovery only for the full amount of damages sustained. The Supreme Court in the Parsons case, holds these damages must be proven antecedent to recovery. Nor can they be recovered without proof of what pecuniary loss had been suffered. The fact is that the Interstate Commerce Commission as well as the Court following its lead, have misapprehended the meaning of the term "reparation." As a matter of fact, there is no such thing under the Act to Regulate Commerce as reparation in the sense of returning the excessive portion of a collected rate. Reparation does not mean returning the rate or some part thereof. Reparation means to pay damages.

> *Mills v. Lehigh Valley R. R. Co.,* 238 U. S. 473, 481.

When the Commission made the award as reparation, they made a finding of damage. "No other intelligent construction can be put upon their statement." The Commission found

(Trans. 27) that Messrs. Ballou & Wright were "Therefore, entitled to an award of reparation." They said further, however (Trans. 27), "On this record, however, the amount of reparation cannot be determined." If the Commission did not mean to say that petitioner was entitled to "an award of damage" no other intelligent construction can be put upon their statement.

> *Mills v. Lehigh Valley R. R. Co.,* 238 U. S. 473, 481.

Therefore, to award reparation means to award damages. Reparation means, indemnification for loss or damage; satisfaction for any injury; amends.

> *Southern Pacific Co. v. Gold Valley Cons. Milling Co.,* 220 Fed. 14, 20.

See,

Cent. Dict. & Encyc., Title "Reparation."

Now, therefore, if a reparation and damage are equivalent terms, then we have a case where the Commission has expressly found that they could not determine the amount of reparation upon the record before them.

This record is before the Court as an exhibit (Trans. 141, 161). Under the Commission's own finding, the defendant in error never did make adequate proof of damage, because no further evidence on the subject of damage was offered. The only thing subsequently done was the filing of a statement concerning the shipments, showing the date of removal, point of origin, point of destination, route, weight, car number and initial, rate applied and charges collected, and there never was any dispute concerning these facts.

No testimony concerning the commercial effect of the rate upon the carrier's business was introduced and no further or other evidence was taken before the Commission than that shown in the transcript in this case, respondent's exhibit "1" (Trans. 161) referred to by the Commission (Trans. 27) as being insufficient upon which to determine the amount of reparation.

Moreover, reparation does not mean that the carriers should return to the shipper the excess of the published rate over the rate found reasonable by the Commission, even with the Commission's authority, for the Commission is limited to an award of damages which may or may not equal such excess. It would be a marvelous coincidence if such damage when proved did equal the excess, and it is certainly an event so unlikely to happen as to be unworthy of a place in the reasoning of the Court. Yet, nevertheless the Supreme Court of the United States in the

International Coal Company case, 230 U. S. quoted at page 429, Vol. 236 of the United States Supreme Court Reports in the Meeker & Company cases, recognized the possibility that the damages might be the same as such excess, or less or many times greater than such excess, but we contend that whatever they were, greater or lesser, than such excess, unless they were proved, could not be recovered. But it is further claimed in the

Darnell-Taenzer Lumber Co. case, 221 Fed. 894,

that the payment by the shipper of excessive and unreasonable freight charges naturally imports legal damage to the shipper therefrom.

Why? If so, how much, to what extent? It certainly does not follow that because Section 1 of the Act to Regulate Commerce was violated that mere proof thereof is sufficient to justify recovery.

It was said by the Circuit Court of Appeals for the Eighth Circuit in the case of

Knudesen v. Michigan Central R. R. Co.,

148 Fed. Rep. 968, 974,

> "To support a recovery under this section (8) there must be a showing of some specific pecuniary injury. A cause of action does not necessarily arise from those acts or omissions of a common carrier that may subject it to a criminal prosecution by the Government, or to corrective or coercive proceedings at the instance of the Commission."

This was approved by the Supreme Court of the United States in the International Coal Company case, 230 U. S. 207. Therefore, without more, the payment by the shipper of excessive and unreasonable freight charges, imports nothing more than a nominal damage at the most. It is a strange doctrine, somewhat anomalous and remarkable, which penalizes a carrier by requiring it to return to a shipper the excess portion of a duly published, filed and approved rate which it has collected from the shipper, over and above a rate which the Interstate Commerce Commission has decided to be reasonable. We say strange, anomalous and remarkable, for surely the carrier is presumed to have intended to fix a reasonable rate in the first instance. That is, it is presumed to be not guilty of the vio-

lation of law. It filed and published a rate. The shipper was bound to pay and the carrier bound to retain that rate.

Pennsylvania R. R. Co. v. International Coal Mining Co., 230 U. S. 194, 197.

The rate, therefore, was the lawful rate, and it continued to be lawful until the Interstate Commerce Commission decided that it was unlawful, in that it was excessive. Henceforth it was unlawful, and while the charging of an excessive and unlawful rate will be *ipso facto* unlawful when the fact of unreasonableness is adjudicated, yet it is submitted that the charging of a rate once approved and filed with the Commission and which becomes a rate which the shipper is bound to pay and the carrier to retain, is not *ipso facto* unlawful *ab initio*. The anomaly at once appears in the proposition that a rate disapproved by the Commission as being too high is *ipso facto* unlawful, and yet until it has been so disapproved, the shipper is bound to pay it and the carrier to retain it. Such reasoning falls short of that degree of logical soundness as to at once cease to be valid. Moreover, it is not true that

> "If complainants were obliged to follow every transaction to its ultimate result and to trace out the exact commercial effect of the freight rate paid, it would never be possible to show damages with sufficient accuracy to justify giving them."

If that were true, what rule of decency or justice would desire to give damages. If damages could not be shown with sufficient accuracy, why should a claimant be entitled to dam-

ages. We say it is not true that the rule would exclude recovery if there was actual damage. The record in this case shows the plaintiffs in error to have actually "traced out the exact commercial effect of the freight rate paid." The rate did not reduce the area of its business activities. Ballou & Wright was not prevented from selling the motorcycles shipped. All were sold. Ballou & Wright purchased the motorcycles f. o. b. Armory, Massachusetts, and sold them in the territory granted to them by their contract with the manufacturer f. o. b. Armory, Massachusetts. How did they do this? They computed the freight rate and in each and every instance added it to the factory price and the customer or purchaser paid it. This is exactly the same as if they had bought and sold f. o. b. Armory, Massachusetts. The profit arising from the business of distributing motorcycles was as great to Messrs. Ballou & Wright under one rate as the other. By this means we have traced out the exact commercial effect of the freight rate paid.

But it is contended that the defendant in error has proven its case by the introduction of the report of the Commission (Trans. 25) and the order authorizing reparation (Trans. 29); that this order, by virtue of Section 16 of the Act to Regulate Commerce, is *prima facie* evidence of the facts therein stated. That the *prima facie* effect of this order was not overcome.

The Court will bear in mind that absolutely no evidence of damage other than this order was introduced; moreover, the Commission itself declared the record to be insufficient to justify an award of reparation, i. e., of damage.

The case, therefore, differs from the Darnell-

Taenzer case in that there was before the Commission as well as before the Court other evidentiary considerations, and we are certainly justified in assuming that if such other evidentiary considerations were not present in that case the Court might have arrived at a different conclusion.

We quote from the opinion at page 894:

> "We, therefore, think it clear that the Commission's statement that the excessive freight rate had been added to the price paid by the customer did not, as a matter of law and *in view of the other considerations referred to by the Commission,* overcome the *prima facie* effect of the findings that plaintiffs were damaged to the extent of such excessive freight rate actually paid by them."

The other consideration referred to by the Commission was the following reported in the margin at page 892, 221 Fed.:

> "It appeared that one witness suspended operations on the Pacific Coast owing to the advance in rates, and other witnesses were of the opinion that more lumber would have been sold under the seventy-five cent rate."

Such, or similar considerations are entirely absent from this case. On the other hand, the testimony is conclusive that Ballou & Wright's motorcycle business was not limited or circumscribed in the slightest degree. All motorcycles bought and shipped were sold, and they were substantially bought and sold f. o. b. Armory, Massachusetts, and that the effect of buying the motorcycles, shipping them to Portland and selling them again for factory price, plus freight,

is substantially buying f. o. b. point of shipment.

The lower court erroneously adopted the view, as did also the Interstate Commerce Commission in finding Ballou & Wright injured by the mere fact of paying the commodity rate of four dollars when the first class rate of three dollars was decided to be reasonable. The effect of the transaction upon the business of the shipper, injuriously or otherwise, is the proximate cause of the damage. If the payment of excessive rate has no effect upon that business, obviously damages do not result.

Ballou & Wright are engaged in the business, among other forms, of distributing to the trade in circumscribed areas of the motorcycles manufactured at Armory, Massachusetts. It is a business contemplating both buying and selling. The business is not interfered with merely by the freight rate paid. It is not lessened; it has gone on just the same. The commercial activities of Messrs. Ballou & Wright has proceeded in the same channel, with the same profitable results under one rate as the other. The commercial effect of the $4.00 commodity rate was absolutely nil in comparison with the commercial effect of the first-class rate contemporaneously in effect. It would be adopting a too narrow view to refuse to consider this unchanged, unlimited and uncircumscribed commercial activity and cling only to the proposition that because a shipper has paid $4.00 for the carriage of 100 pounds when he should have paid $3.00 for such carriage that he is thereby damaged in the sum of $1.00, for it is obvious that when the commercial effect of the freight rate is traced that he is not damaged in such sum.

The tendency of the Interstate Commerce Commission in the light of their decisions was to find:

1st. That the carrier had received some funds which it was not entitled to for the particular service rendered.

2nd. And it ought to make reparation to somebody, and

3rd. The Commission believed that it should return the money to the extent of the excess.

Now, the authority of law for such proceedure did not exist, for the Commission has no authority to so declare. Its authority is found in Section XIV of the Act to Regulate Commerce, which authorizes an investigation to be made and a report in writing in respect thereto, and "in case damages are awarded, such report shall include the findings of fact on which the award is made."

Now, if the carrier does not pay the amount of this award of damages, then action may be had under Section XVI of the Act.

The plaintiff in error did not attempt independently of the orders of the Interstate Commerce Commission to establish "the full amount of damage sustained" recoverable under Section VIII of the Act.

We do not dispute that by the introduction of this order, together with proof of the fact of shipment, that a *prima facie* case was made, but this *prima facie* case is overthrown by the testimony of plaintiffs in error. This testimony is of two parts:

1st. All of the pleadings filed with and the testimony taken before the Interstate Commerce

Commission, out of which came the orders sued upon is in evidence. (Trans. pp. 141, 161.)

Secondly. Direct testimony tracing out the exact commercial effect of the freight rate paid is in evidence, establishing that the payment of the commodity rate of $4.00 had no appreciable or other effect whatever upon the commercial activities and business of the defendant in error.

This meets and overthrows the *prima facie* effect of the orders of the Interstate Commerce Commission.

But it may be contended that the Interstate Commerce Commission in the case at bar did not measure the damage by computing the difference between the two rates. The words of the finding are (Trans. 27):

> "We further find that complainant was damaged in an amount equal to the difference between the amount collected and the amount it would have paid at the first class rate contemporaneously in effect."

It may be claimed that the finding is not that complainant was damaged in a sum measured by the difference between the two amounts or a sum, being the amount of difference between the two rates multiplied by the number of hundred weight shipped, but that the finding of damage was based upon some other testimony which showed the petitioner's damage in the aggregate to be equal or co-extensive with a sum so measured or computed.

This distinction was noticed by the Supreme Court of the United States in the case of Meeker & Co. v. Lehigh Valley R. R. Co., 236 U. S. 412, 429.

Of course, it is common knowledge in the first place, and in the second place absolutely shown by this record, that the Interstate Commerce Commission in the case at bar did measure the damage by taking the difference between the two rates and multiplying by the number of hundred pounds shipped. That proposition is absolutely proven by the pleadings in the case and will not be gainsaid. (See paragraphs 14, Trans. 16; 7, Trans. 37 and 10, Trans. 45 of the petition.) Yet where an order contains language that the shipper was "damaged to the extent of the difference" it might be claimed that the plain import of the findings is that the amounts awarded represent the claimant's actual pecuniary loss.

This was the view of the Supreme Court of the United States in the Meeker & Co. case, 236 U. S. 429, wherein the court said:

> "And in view of the recital that the findings were based upon the evidence adduced, it must be presumed, there being *no showing to the contrary,* that they were justified by it."

A reading of the opinion in the Meeker case justifies the conclusion that if the evidence before the Interstate Commerce Commission had been before the Court and it had been determined as it has been in this case, that the Interstate Commerce Commission did not undertake to make a finding respecting the claimant's actual pecuniary loss by tracing the commercial effect of the Freight rate upon the business activities of the shipper, but instead were content to subtract the rate found reasonable from the rate determined unreasonable, that such method of ascertaining "the full amount of damages sus-

tained" under Section VIII of the Act to Regulate Commerce would have been disapproved.

The case at bar differs from the Meeker case in that all the evidence taken before the Interstate Commerce Commission is now before the Court and *is a showing to the contrary,* within the meaning of the opinion in the Meeker cases. Therefore, it cannot be presumed that the finding of the Interstate Commerce Commission was based upon the evidence adduced. As a matter of fact no evidence was adduced before the Interstate Commerce Commission bearing upon proving or tending to prove damage. The claimant did not proceed upon the theory that it was compelled or required to prove damage. It did not allege damage. It proceeded upon the theory that the measure of the damage was the difference between these two rates. Therefore, in the absence of evidence upon which to base an award of damage, the order of the Interstate Commerce Commission in that respect is void.

It has become fundamental in this department of American jurisprudence that a finding of the Interstate Commerce Commission without evidence is beyond the power of the Commission, and an award based thereon is contrary to law and must be set aside. Such finding without evidence is arbitrary and baseless. It would mean that where rights dependent upon facts the Commission could destroy all rules of evidence and capriciously make their finding by administrative fiat.

> "Such authority, however beneficiently exercised in one case," says the Supreme Court of the United States, "could be inju-

riously exerted in another; is inconsistent with rational justice, and comes under the Constitution's condemnation of all arbitrary exercise of power."

Int. Com. Comm. v. Louis. & Nash. R. R., 227 U. S. 88, 91.

Or if the facts found do not as a matter of law support the order made, it is void.

We are aware that the courts will not review the Commission's findings of fact by passing on the credibility of witnesses, or conflicts in the testimony, but nevertheless the legal effect of evidence is a question of law and a finding without evidence to support it is beyond the power of the Commission.

Int. Com. Comm. v. Louis. & Nash. R. R., 227 U. S. 88, 92.

Florida East Coast R. R. Co. v. U. S., 234 U. S. 167, 185.

Under those circumstances such question involves not an issue of fact, but one of law which it is the duty of the court to examine and decide.

Florida East Coast R. R. v. U. S., 234 U. S. 167, 185.

The pleadings before the Interstate Commerce Commission are reported at page 141 of the transcript. The testimony, and the whole thereof taken before the Interstate Commerce Commission is reported at page 161, *et seq.* of the transcript.

The testimony before the Interstate Commerce Commission (Trans. 168) disclosed that Mr. Wright, of Ballou & Wright, added $15 to

the list price for the purpose of covering the freight and which was from 60 cents to $3.00 more than the total amount of such charges. This amount included all handling charges, as well. (Trans. 169.) A motorcycle which retails for $250 at Armory, Massachusetts, Messrs. Ballou & Wright retail for $265. (Trans. 170.)

Mr. W. J. Fink (Trans. 103) testified concerning the circumstances under which motorcycles were bought and sold, from which it appeared that the manufacturer distributed large number of catalogues whereby the public was advised of the list price, or to say the retail price, f. o. b. factory, Armory, Massachusetts, of motorcycles, and the distributors on the West coast used this factory price as a basis of their commercial activities in motorcycles, selling all machines purchased at list price, plus freight. (Trans. 108.) In other words, the testimony before the Interstate Commerce Commission, as well as the testimony before the Court, conclusively showed that Messrs. Ballou & Wright bought and sold motorcycles, f. o. b. factory, Armory, Massachusetts. Of course, they advanced the freight and they were out the use of this money until the motorcycles were fully distributed. Just how long they were deprived of the use of their money the evidence does not disclose, but it is obviously very clear that, if it be the duty of the court in ascertaining the "full amount of damages sustained" the recovery of which is authorized by Section VIII of the Act to Regulate Commerce, to measure the commercial effect which the assessment of a commodity rate in place of the first class rate had upon the business activities of the defendant in error, then such effect would not consist in

returning to them the excess above the reasonable rate when the commercial activities of the defendant in error were such that such excess was not lost to them, but it would merely consist in allowing to defendant in error an amount by way of damage equal to the interest at the legal rate upon such excess charges *from* the time they were advanced to cover the freight bills incident to the shipment *to* the time when the motorcycles were distributed and the freight advancements returned in the ordinary course of the commercial and business activities of the defendant in error.

The evidence is not sufficient to enable the court to make a finding upon this point. Therefore, the court cannot make the finding. The evidence discloses no attempt upon the part of Messrs. Ballou & Wright to prove a damage before the Interstate Commerce Commission. They made no attempt to prove such damage before the lower court, save and except to avail themselves of the statutory effect of the orders of the Interstate Commerce Commission.

We have shown that the Commission had no testimony upon which to base a finding of damage. We have shown that they adopted the method of taking the difference between the two rates and multiplying the difference by the number of hundred pounds shipped in finding the damage.

Although the Interstate Commerce Commission has said in its order "That complainant was damaged in an amount equal to the difference between the amount collected and the amount it would have paid at the first-class rate contemporaneously in effect," and although the Supreme

Court of the United States in the case of Meeker & Co. v. Lehigh Valley R. R. Co., 236 U. S. 429, perceived in the words "damaged to the extent of the difference" between what they actually paid and what they would have paid had they been given the rate which the Commission found would have been reasonable, nothing pointing to the application of an erroneous or inadmissible measure of damages in the absence of evidence showing the facts upon which the Interstate Commerce Commission acted, yet the record in the case at bar fully shows that the Commission had no testimony of any kind showing damage before it. But the testimony did show the contrary. It had evidence showing or tending to show that no pecuniary loss resulted from the transaction complained of. It had no testimony showing the character of damage, which Section VIII of the Act to Regulate Commerce authorizes to be recovered. All the Commission had before it was:

(a) Total number of hundred pounds shipped;

(b) The rate collected;

(c) The rate found reasonable;

(d) The difference;

(e) The total in dollars ascertained by multiplying the quantity shipped by the difference between the two rates.

With this computation before the Commission, they have made a finding,

> "That complainant was damaged in an amount equal to the difference between the amount collected and the amount it would have paid at the first-class rate contemporaneously in effect."

Now, the Interstate Commerce Commission has either adopted as the measure of the damage the difference between those two rates, or it convicts itself of intellectual dishonesty in reciting that the damage was "equal to the difference," without having any other testimony before it as a basis upon which to rest the conclusion or ultimate fact that such damage sustained did as a matter of fact equal the difference between those two rates.

The Supreme Court of the United States in the Meeker case at page 429, in speaking of the testimony said:

> "If it showed that the damages corresponded to the rebate in one instance and to the overcharge in the other the claimant was entitled to an award upon that basis."

Theoretically this is true, but practically there wouldn't be one case in a million where the damages proven would actually correspond with this difference, and from a practical viewpoint the remark of the Supreme Court is not true.

And because the railroad company in the Meeker cases did not introduce in the court below the evidence upon which the Commission acted, the Supreme Court presumed that the findings of the Commission were justified by the evidence, and the coincidence of the damages corresponding to the rebate in one instance and to the overcharge in the other was regarded and presumed as having been the subject of sufficient proof, and, for those reasons, the finding of the Commission was upheld. Being upheld it becomes by virtue of Section XVI of the Act

to Regulate Commerce *prima facie* evidence that Meeker & Company were damaged as found.

The case at bar is different. The testimony before the Interstate Commerce Commission is in evidence. It shows that no evidence was introduced by claimants bearing upon the question of damage. The finding of the Interstate Commerce Commission many times heretofore quoted is not based upon any evidence.

The Court in reviewing this question of law thereby presented, must necessarily hold the order void for the want of evidence to support it. Being void, the order has no *prima facie* evidentiary effect.

The record of the trial in the court below, admissions, stipulations and testimony included, together with the testimony offered by plaintiffs in error and excluded by the court, positively and absolutely disclose defendant in error to have suffered no damage. If it be true that the assessment and collection of an excessive and unreasonable rate imports legal damage to the shipper therefrom, as was indicated in the Darnell Taenzer case, it can only be true that such acts would import nominal damages. It certainly could not import actual damage, for there is no measure of its extent.

The question involved in this case has been a live one before the Interstate Commerce Commission for some time. The carriers have uniformly contended that Section VIII of the Act to Regulate Commerce was not being given in respect to the measure of recovery, the correct construction. It has now been demonstrated that the construction given in respect to the measure of damage in discrimination cases by

the Interstate Commerce Commission was erroneous.

> *Pennsylvania Railroad Company v. Int. Coal Co., supra.*

In a companion case with the one at bar,

> *Ballou & Wright v. N. Y. Etc. R. R. Co. et tls,* 34 I. C. C. 120,

the Interstate Commerce Commission has squarely grounded its finding in respect to damage upon the doctrine that the measure of the damage is the difference between the rate collected and the rate fixed by the Commission as reasonable.

The Commission still thinks as was stated in Michigan Hardwood Mfg. Co. v. Bureau, 27 I. C. C. 32, that,

> "If complainants were obliged to follow every transaction to its ultimate result and to trace out the exact commercial effect of the freight rate paid, it would never be possible to show damages with sufficient accuracy to justify giving them."

This was the view of the Commission in discrimination cases, but it was erroneous; the correct view being that the commercial effect of the freight rate paid should be traced and if as a result damages were found to exist, judgment of recovery followed, but if as a result damages with sufficient accuracy had not been shown then no recovery followed.

Plaintiffs in error submit that such view is also erroneous in unreasonable and excessive rate cases. No ancient measure or standard of damage was ever based upon the inability of the claimant to prove his case.

Thus far we have discussed the general question involved without specific reference to the assignments of error. These assignments are necessarily numerous, but the precise question involved is centered upon the court's first conclusion of law, which reads as follows (Abstract, Trans. 129):

> "That the measure of damages to petitioner herein is the difference between the amount collected by the said respective respondents and paid by the said petitioner on the said respective shipments, and the amount the petitioner would have paid at the said first class rate in effect at the time the said respective shipments moved."

The plaintiffs in error objected to this conclusion as being an erroneous view of the law, and requested the court to find in lieu thereof the following:

> "That the measure of damages in this case is not the difference between the rate charged by the respondents for the shipments complained of in the complaint and the sum which the petitioner would have paid had the rate been assessed in the amount fixed by the Interstate Commerce Commission as reasonable."

The finding adopted by the Court was further objected to upon the ground that "It does not state a proper conclusion of law as to the measure of damage (Trans. 129).

Plaintiffs in error presented to the Court (Trans. 132) a series of findings of fact and conclusions of law, which they requested the court to adopt and sign; the ultimate effect of which requests was that the commercial effect of the

collection of the commodity rate upon the business activities of the defendant in error as shown by the evidence was of no moment. That there was no evidence introduced respecting damages, such as loss of profits on sales in competitive territory. That there was no competitive territory from which Messrs. Ballou & Wright were excluded. That no data was before the Court upon which to ascertain the damage, and in short, no damage was shown (Abstract 136, 137). (See Assignments of Error Nos. 14, Abstract 201; 22, Abstract 205; 25, Abstract 206, and 26, Abstract 207.)

These assignments of error all center upon the single proposition that the rule laid down by the Supreme Court of the United States in the International Coal Company case concerning the measure of damage, that damages must be proven; that the damages recoverable are separate and apart from any computation or difference between rates; that in ascertaining the damage, evidence relevant to the allegation of injury alone should be considered, and in short, that the rule in excessive and unreasonable rate cases concerning the recovery of damages is precisely the same as it is in the so-called discrimination cases.

That Section VIII of the Act to Regulate Commerce authorizing recovery of "the full amount of damages sustained in consequence of any such violation of the provisions of this act," has only one construction equally applicable to all sorts of recovery undertaken by virtue thereof, and that it is not to have an accommodation construction, that is, a construction differing for each particular case that comes before the Com-

mission. It follows, as a conclusion, the premises considered, that the judgment of the lower court is erroneous and should be reversed.

Respectfully submitted,

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